

Before the
Federal Communications Commission
 Washington, DC 20554

FILED/ACCEPTED

APR 11 2007

Federal Communications Commission
 Office of the Secretary

In the Matter of:)	
)	
JCR Advertising & Production)	CG Docket No. 06-181
)	CSR-CC-0252
Video Programming Accessibility)	
)	
Petition for Exemption of Closed)	
Captioning Requirements)	

To: Office of the Secretary

MOTION TO STRIKE AND
PRECAUTIONARY REPLY

JCR Advertising & Production ("JCR"), by counsel, hereby files this Motion to Strike and Precautionary Reply. On December 9, 2005, JCR filed a "Petition for Exemption of the Closed Captioning Rules." On November 7, 2006, the FCC placed 494 petitions for exemption, including JCR's Petition, on public notice. Oppositions to the Petition were due by November 27, 2006. A coalition of hearing advocacy groups requested a 120-day extension of time in which to file oppositions against the parties seeking exemption from the FCC's closed captioning rules. By Public Notice, DA 06-2329, released November 21, 2006, the FCC granted the Motion for Extension of Time.

On March 2, 2007, Telecommunications for the Deaf and Hard of Hearing, Inc. ("TDI"), National Association for the Deaf ("NAD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN), Hearing Loss Association of America ("HLAA"), Association of Late-Deafened Adults, Inc. ("ALDA"), American Association of People with Disabilities ("AAPD"), and California Coalition of Agencies Serving the Deaf and Hard of Hearing ("CCASDHH) (collectively the "Advocacy Groups") filed an Opposition to JCR's Petition for Exemption.

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The Advocacy Groups are Not Interested Persons Within the Meaning of the FCC's Rules.

Section 79.1 (f) (6) of the FCC's rules provides that "any interested person may file comments or oppositions to the petition" for exemption.¹ The Advocacy Groups are not interested persons within the meaning to the FCC rules and the Administrative Procedure Act.² The Advocacy Groups do not allege that the FCC's grant of the above captioned Petition would, in any way, injure them or any of their members. Nor do they claim that any member regularly watches JCR's programs. The Advocacy Groups have not shown how the FCC's grant of the Petition for Exemption would cause them or their members harm. Without a showing of an injury-in-fact, the Advocacy Groups are not "interested persons." Therefore, they do not have standing to participate in this proceeding.

The Administrative Procedure Act provides that an "interested person" may appear before an agency for the presentation, adjustment, or determination of an issue. 5 U.S.C.A. § 555(b). The Court of Appeals has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language of the Administrative Procedure Act. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle*, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). Compare, *In the Matter of Cox Communications, Inc.*, 14 FCC Rcd 11716 (1999) (Petitioners are not "interested persons" outside of the area where they are cable subscribers.)

¹ 47 C.F.R. §79.1 (f)(6).

² 5 U.S.C.A. § 555(b).

The "irreducible constitutional minimum" for standing is that the appellant was injured in fact, that its injury was caused by the challenged conduct, and that the injury would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340, 145 F.3d 1410, 1412 (D.C. Cir. 1998).

Associations, such as the Advocacy Groups, have standing to sue on behalf of their members only if (1) at least one of the members would have standing to sue in his own right, (2) the interest the association seeks to protect is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that ~~an~~ individual member participate in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Generally, the Commission accords party in interest standing to a petitioner that demonstrates either residence in the station's service area, or that the petitioner listens to or views the station regularly.³ *Chet-5 Broadcasting, L.P.* 14 FCC Rcd 13041 (1999). In this case, Advocacy Groups should have demonstrated that at least one of their members resides in the service area of a station that broadcasts JCR's programming, and that the member regularly views the programming. The Advocacy Groups have not provided the statement of a single member who claims to be aggrieved or adversely affected by the grant of JCR's Petition for Exemption of the Closed Captioning rules. The Advocacy Groups lack standing to oppose JCR's Petition for Exemption of the Closed Captioning rules. Accordingly, the Commission should strike the Advocacy Groups' Opposition without consideration.

³ 47 U.S.C. §309 (d)(1) ("Any **party** in interest may file with the Commission a petition to deny. . .")

Procedural Defects

The Advocacy Groups' Opposition has numerous procedural defects. Section 1.49(a) of the Commission's Rules provides that all pleadings must be double-spaced. The Advocacy Groups' Opposition is single-spaced. Further, had the Advocacy Groups properly spaced the Opposition it would have exceeded ten double spaced pages. Section 1.49(b) and (c) provide that all pleadings exceeding ten pages shall contain a table of contents and a summary. The Advocacy Groups' Opposition contains neither a table of contents nor a summary. These procedural defects provide a separate and independent reason for striking the Advocacy Groups' defective Opposition,

Precautionary Reply

A review of the filings made by the Advocacy Groups in CG Docket No. 06-181 shows that the Advocacy Groups filed numerous cookie-cutter, one-size-fits-all pleadings. In the case of JCR, the text of the Advocacy Groups' Opposition does not match the facts as presented in JCR's Petition. For example, on page 5 of the Opposition the Advocacy Groups, without any explanation or correlation to the facts claim that JCR "has not provided sufficient financial information to determine whether an undue burden would result," Yet on the first page of the Opposition, the Advocacy Groups, without argument, accept JCR's financial showing. The Advocacy Groups' Opposition paraphrases the key financial points of JCR's Petition. As JCR stated in its Petition,

JCR estimates that its production net profit margin is 11.2%. In order to implement an in-house closed captioning department, JCR estimates an additional \$13,277 per month in payroll, \$255,000 in capital expenditures for edit bays and \$60,000 for office expansion, for a total first year outlay of \$474,3224. The closed captioning costs would result in a net loss of .3% for JCR. (footnote omitted).

The Advocacy Groups accept JCR's statement that providing closed captioning would result in a net loss to JCR's business, yet in their cookie-cutter pleading they somehow claim that JCR has failed to demonstrate that an undue burden would result. The FCC should not consider such one-size-fits-all advocacy.

It would be futile to address the Advocacy Groups' Opposition point by point, since the Advocacy Groups have made no effort to connect the uncontested facts set forth in JCR's Petition with the relevant FCC rules and regulations. By way of further example, the Advocacy Groups claim that JCR failed to provide sufficient information that it could not receive closed captioning assistance from the distributors of its programming. JCR is a producer of program-length commercials. In its Petition, JCR demonstrated that its primary competition is the print media. JCR clearly set forth and the Advocacy Groups have not rebutted the fact, that the production costs differ significantly between a half hour commercial compared to print media, because *inter alia* newspapers do not charge their clients production fees. As JCR clearly stated in its Petition,

Since television program-length commercial production costs are considered high compared to other media, JCR does not believe it can pass these cost on to its customers. Rather, JCR believes that the additional costs will result in advertiser migration to other media venues such as print, radio and billboards.

The Advocacy Groups do not dispute JCR's showing that it will not be able to pass the costs of closed captioning to its advertisers. Nor do they dispute JCR's showing that the television stations it buys time from would not be willing to pay the additional fees for closed captioning. JCR's showing that it will suffer an undue burden is conclusive and

unchallenged. Accordingly, the FCC should grant its Petition for exemption of Section 79.1 of the FCC's rules.

Conclusion


The Advocacy Groups lack standing to file an Opposition to JCR's Petition for Exemption. Additionally, their pleading contains numerous procedural errors. Accordingly, FCC should dismiss the Advocacy Groups' Opposition without consideration.

Even if the Commission should consider its one-size-fits-all pleading, what could it make of such a disjointed document? The Advocacy Groups accept all of JCR's factual showings. The Advocacy Groups merely provide a legal memo which fails to connect the FCC rules with the facts of this case (or apparently any other case). What is the point of such a pleading? Apparently the Advocacy Groups have determined that no programmer, regardless how small or how deserving, should ever be granted an exemption. Without examining or challenging the facts, the Advocacy Groups have

concluded that none of the 494 petitions for exemption listed in the FCC's November 7, 2006 Public Notice should be granted an exemption. Thus, the Advocacy Groups would rather put hundreds of small program producers out of business, rather than concede that occasionally there is a need for an exemption of the Commission's rules. The FCC should not countenance such shameful and selfish conduct. The Advocacy Groups' Opposition, to the extent the FCC considers it at all, should be summarily denied.

Respectfully submitted,

JCR ADVERTISING & PRODUCTION

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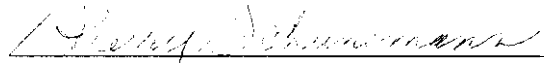
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April 11, 2007

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Motion to Stroke and Precautionary Reply" was mailed by First Class U.S. Mail, postage prepaid, this 11th day of April, 2007 to the following:

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